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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 928

LOUIS J. GNOTTA,
*Petitioner,*

vs.

UNITED STATES OF AMERICA; THE UNITED STATES CIVIL SERVICE COMMISSION; THE DEPARTMENT OF THE ARMY, KANSAS CITY DISTRICT, CORPS OF ENGINEERS; COLONEL W. G. KRATZ; M. F. HOY; D. H. MYERS; M. M. TURNER; O. E. PETTIJOHN; F. M. NELSON; H. B. HAWORTH,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## INDEX


Citation to Opinion Below ..... 2
Jurisdiction ..... 2
Questions Presented ..... 2
Statutes Involved ..... 2
Statement of the Case ..... 4
Reasons for Granting the Writ ..... 7
Appendix—Opinion of the United States Court of Appeals for the Eighth Circuit ..... A1


### Table of Authorities

CASES


*Gnotta* v. *United States*, 415 F.2d 1271 (1969) ..... 2
*Jones* v. *Mayer Co.*, 392 U.S. 409 ..... 2, 7


STATUTES


Executive Order No. 11246, 42 U.S.C.A. 2000(e)N ..... 2, 3, 4, 7
28 U.S.C. 1254(1) ..... 2
28 U.S.C. 1343(4) ..... 2

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UNITED STATES OF AMERICA; THE UNITED STATES CIVIL SERVICE COMMISSION; THE DEPARTMENT OF THE ARMY, KANSAS CITY DISTRICT, CORPS OF ENGINEERS; COLONEL W. G. KRATZ; M. F. HOY; D. H. MYERS; M. M. TURNER; O. E. PETTIJOHN; F. M. NELSON; H. B. HAWORTH,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Louis J. Gnotta prays that a writ of certiorari be issued out of this Court to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on September 10, 1969, affirming a judgment entered in favor of respondents in the United States District Court for the Western District of Missouri.

## CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals printed as in the Appendix hereto is reported as *Gnotta* v. *United States*, 415 F.2d 1271 (1969).

## JURISDICTION

The judgment of the Court of Appeals was entered on September 10, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Does the District Court have jurisdiction under 28 U.S.C. 1343(4) and this Court's holding in *Jones* v. *Mayer Co.*, 392 U.S. 409, to have a judicial review of the agency action, under Executive Order No. 11246, because the government employee has a right to due process, and has a right to an impartial hearing, and can a federal court fashion an appropriate and effective remedy?

2. Does Executive Order No. 11246, "Equal Opportunity in Federal Employment," grant a federal employee a right that can be enforced in a federal court?

## STATUTES INVOLVED

This case involves the judicial review of Executive Order No. 11246 which states:

**Executive Order No. 11246**

**42 U.S.C.A. 2000(e)N**

Sept. 24, 1965, 30 F.R. 12319

EQUAL OPPORTUNITY IN FEDERAL EMPLOYMENT

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

## PART I—NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT

Section 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.

Sec. 102. The head of each executive department and agency shall establish and maintain a positive program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in Section 101.

Sec. 103. The Civil Service Commission shall supervise and provide leadership and guidance in the conduct of equal employment opportunity programs for the civilian employees of and applications for employment within the executive departments and agencies and shall review agency program accomplishments periodically. In order to facilitate the achievement of a model program for equal employment opportunity in the Federal service, the Commission may consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Part.

Sec. 104. The Civil Services Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, creed, color, or national origin. Procedures for the consideration of complaints shall include

at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

Sec. 105. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this Part, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Part.

* * *

## STATEMENT OF THE CASE

Louis J. Gnotta, petitioner-employee, was employed by the Corps of Engineers, Kansas City District, Department of the Army in November, 1955 as a cartographic aid GS-7. He has never been promoted. He claims that he has never been promoted because of discrimination against him because of his Italian descent.

He made a complaint under the applicable regulations under Executive Order 10925 and Executive Order No. 11246 (printed in the addendum), "Equal Opportunity in Federal Employment" 42 U.S.C.A. 2000(e)N, and a hearing was held in the agency in October, 1966, consisting of 966 pages of testimony. (A. 20-35).[1]

Thereafter the Equal Employment Opportunity Officer for the Department of the Army rendered a decision that the evidence did not substantiate the allegations of discrimination.

On September 27, 1967, the Board of Appeals and Review of the United States Civil Service Commission affirmed the decision of the Army.

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1. References are to the Appendix record in the Court of Appeals.

On January 8, 1968, the employee filed his Complaint for judicial review, mandamus and damages against the defendants. (A. 2-6).

Louis J. Gnotta, the employee, in his complaint against the United States of America; the United States Civil Service Commission; the Department of the Army, Kansas City District, Corp of Engineers; Colonel W. G. Kratz; M. F. Hoy; D. H. Myers; M. M. Turner; D. E. Pettijohn; F. M. Nelson and H. B. Haworth, the defendants, sought judicial review of an agency decision in which the agency affirmed the decision of the Equal Employment Opportunity Officer for the Department of the Army that the evidence, in the agency hearing, did not substantiate the employee's allegations of discrimination against Mr. Gnotta based on his national origin in violation of the Executive Order "Equal Opportunity in Federal Employment"; in Mr. Gnotta's complaint he also sought mandamus to compel enforcement of the agency's regulations under Executive Orders 10925 and 11246, 42 U.S.C.A. 2000(e)N, and to compel a promotion; Mr. Gnotta also sought in his complaint damages of $10,000.00 against all of the defendants. (A. 2-6).

On April 4, 1968, the defendants answered, and among other defenses asserted lack of jurisdiction, but alleged that the decision of the Hearing Officer was not arbitrary, capricious or an abuse of discretion, and further that the employee was estopped to claim that he was prejudiced in the hearing because of the relationship of the Hearing Officer to the other parties involved; also answering that mandamus would not lie and that the Executive Order regulations or statutes do not provide for money damages. (A. 6-12).

On June 13, 1968, the defendants filed their Motion to Dismiss or in the Alternative Motion for Summary Judgment. (A. 12-15).

On September 13, 1968, the Honorable John W. Oliver, District Judge, entered his Memorandum and Order dismissing the complaint for "want of proper jurisdictional allegations." (A. 15-19).

The petitioner-employee, a decorated veteran of World War II, claims that the discrimination against him because of his Italian descent is a direct violation of the Executive Order 11246, and that the indices of this discrimination are the animosity and hostility existing between him and his supervisor, the defendant Mr. Haworth; that this animosity has been well-known to the officers superior to him, including all of the defendants, that this discrimination has manifested itself in denials to him of opportunity of advancement, promotion and training; he has been passed over for promotion and for other positions in the district.

The employee contends that he was denied a fair and impartial hearing because the Hearing Officer was an associate lawyer of the attorneys who represented the defendants and in fact the Hearing Officer was a subordinate of some of the defendants. (A. 2-6).

The employee sought a rehearing before an impartial Hearing Officer, a promotion and damages for his lost wages as a result of the failure to promote him due to the discrimination.

The District Court decided without a hearing or review that it has no jurisdiction over any of the defendants to grant any relief to the employee.

The District Court granted the defendants' Motion to Dismiss "for want of proper jurisdictional allegations in plaintiff's complaint". (A. 15-19).

The issue is that petitioner-employee Louis J. Gnotta contends that the District Court does have jurisdiction to hear and determine his complaint for judicial review, man-

damus and damages under the Executive Order, "Equal Opportunity in Federal Employment."

The District Court held that none of the defendants could be sued in this type of action. To deny the review denies the employee of due process. The Court of Appeals affirmed the District Court.

## REASONS FOR GRANTING THE WRIT

The Court of Appeals decided an important question of federal law which has not been but should be settled by this court and has decided a federal question probably in conflict with the decision of this court in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409.

If there is no judicial review of proceedings under Executive Order 11246, as the Court of Appeals so held, then the Executive Order is a nullity, and no federal employee has a right to equal opportunity in employment. Apparently the Court of Appeals felt there was something that could be done in the case but affirmed the dismissal by saying "Plaintiff Gnotta has too many hurdles to overcome in this lawsuit as presently formulated." (A. 14).

Equal opportunity cannot be an empty phrase, even in Executive Order 11246, for under *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, it was held that a federal court could fashion an effective equitable remedy.

The judgment of the Court of Appeals and the District Court should be reversed.

Respectfully submitted,

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# United States Court of Appeals

FOR THE EIGHTH CIRCUIT

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**No. 19,502**

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Louis J. Gnotta,

Appellant,

v.

United States of America; The United States Civil Service Commission; The Department of the Army, Kansas City District Corps of Engineers; Colonel W. G. Kratz; M. F. Hoy; D. H. Myers; M. M. Turner; O. E. Pettijohn; F. M. Nelson; H. B. Haworth;

Appellees.

} Appeal from the United States District Court for the Western District of Missouri.

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[September 10, 1969.]

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Before BLACKMUN, MEHAFFY and LAY, Circuit Judges.

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BLACKMUN, Circuit Judge.

Louis J. Gnotta appeals from the dismissal of his three-count complaint based on his not receiving a promotion in 11 years of work with the Corps of Engineers, Kansas City District, Department of the Army. His claim is that this absence of promotion was due to discrimination against him because of his Italian ancestry.

The defendants are the United States; the United States Civil Service Commission; the Department of the Army, Kansas City District, Corps of Engineers; Col. W. G. Kratz, district engineer and principal supervisor; M. F. Hoy, district controller and executive assistant; D. H. Myers, chief personnel officer; M. M. Turner, assistant chief of the engineering division; O. E. Pettijohn, chief of the real estate division; F. M. Nelson, assistant chief of the real estate division; and H. B. Haworth, supervisor.

By the first count of his complaint the plaintiff seeks review of the decision of the Board of Appeals and Review of the United States Civil Service Commission; by its second count he seeks a writ of mandamus to compel the individual defendants to perform duties said to be imposed upon them by Equal Employment Opportunity regulations: and by its third count he seeks $10,000 damages. Jurisdiction is claimed, for the respective counts, under the Administrative Procedure Act, now 5 U.S.C. § 701-06; the Act of October 5, 1962, Pub. L. No. 87-748, § 1(a), 76 Stat. 744, now 28 U.S.C. § 1361; and the Tucker Act, 28 U.S.C. § 1346(a)(2).

The defendants, through the United States Attorney, filed an answer to the complaint and, thereafter, a motion to dismiss or, in the alternative, for summary judgment. Judge Oliver granted the motion to dismiss and did so "for want of proper jurisdictional allegations in plaintiff's complaint." The court's supporting memorandum is not reported. Gnotta appeals.

*The administrative proceeding.* Mr. Gnotta filed his administrative complaint under regulations issued pursuant to Executive Order No. 11246 of September 28, 1965, 30 F.R. 12319, 2 U.S. Code Cong. & Ad. News 4416 (1965),

entitled, "Equal Employment Opportunity",[1] and, assertedly, under the thereby superseded Executive Order No. 10925 of March 8, 1961, 26 F.R. 1977, 1 U.S. Code Cong. & Ad. News 1274 (1961).

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1. "Section 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.

"Sec. 102. The head of each executive department and agency shall establish and maintain a positive program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in Section 101.

"Sec. 103. The Civil Service Commission shall supervise and provide leadership and guidance in the conduct of equal employment opportunity programs for the civilian employees of and applications for employment within the executive departments and agencies and shall review agency program accomplishments periodically. In order to facilitate the achievement of a model program for equal employment opportunity in the Federal service, the Commission may consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Part.

"Sec. 104. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, creed, color, or national origin. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

"Sec. 105. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this Part, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Part."

Sections 101 and 104 had been amended, in ways not of significance here, by Executive Order No. 11375 of October 17, 1967, 32 F.R. 14303, 2 U.S. Code Cong. & Ad. News 3519, 3520 (1967). Executive Order Nos. 11246 and 11375 have been superseded in part by Executive Order No. 11478 of August 8, 1969.

The ensuing agency hearing took place in October 1966, lasted four days, produced a four-volume transcript of 966 pages, and brought out certain undisputed facts:

Plaintiff Gnotta was born July 3, 1922, of Italian parents in Kansas City, Missouri. He is a World War II veteran, attained the rank of sergeant, was awarded the Purple Heart with Oak Leaf Cluster and two battle stars, and received an honorable discharge from the service. He was employed by the Corps of Engineers in November 1955 as a cartographic compilation aide at grade GS-7. He has never been promoted out of that grade. He has a high school education and some engineering training. He is a civil defense instructor. He has an AEC license to handle cobalt 60. In 1956-57 he passed certain civil service written examinations for professional engineering. He is registered with the Missouri State Board of Registration for Architects and Professional Engineers as an engineer-in-training (Mo. Rev. Stat. § 327.150 and § 327.035.2 (1959)). Since July 25, 1960, he has filed numerous applications for promotion with respect to vacancies with the Corps. He has not been chosen for any of these. He does not possess a security clearance. He has not been selected for further training. No one else has been held so long in the District without a promotion. There are no Italians there above grade GS-12.

The hearing, however, produced conflict as to other facts which bear upon Gnotta's claim of discrimination because of national origin:

Defendant Haworth, Mr. Gnotta's supervisor until 1960, and, apparently, the pivotal figure in Gnotta's discomfort, testified that he felt no animosity toward Gnotta. Other witnesses stated that friction or animosity existed between the two men. When Gnotta joined the Corps, he and Haworth were both in GS-7. Haworth, however, has

been promoted to GS-11. The two men have hardly spoken for a number of years. Haworth acknowledged that he had talked to Gnotta only once since 1960. He denied that he had discriminated against him because of his national origin or in any way. Witness Herbert, who had worked with Mr. Gnotta under Mr. Haworth, said that Haworth once told him he should not associate with Gnotta. Witness Vaught, who also worked with Gnotta, said that Haworth told him he would not be promoted if he associated with Gnotta. Haworth denied that he told Vaught and Herbert not to associate with Gnotta.

On the other hand, a number of witnesses (Herbert, Brayles, Montanari, Giorga, Davis, Norman Smith, Frederickson, Corolla, Lee, Haworth, Hoy, Edward C. Smith, Lowe, Nelson, Pettijohn, Valenstein, and Rollings), some of them of obvious Italian descent, testified, or by affidavit stated, that they did not think Gnotta was discriminated against because of his national origin, or that they knew of no discrimination against Italians in the Corps, or that they themselves did not discriminate. Other witnesses (D'Marco and Van Orman) felt or suspected that there was discrimination, and still others (Vaught and Thomas) felt that it was directed against Gnotta.

Mr. Gnotta stated that he never had an Italian supervisor; that in the Kansas City community at least 10 per cent of the people are of Italian origin; that the newspapers there are prejudiced against Italians; that he was not given proper equipment; that he was denied counseling and self-improvement; and that he is the only one in his group regularly excluded from management activities.

The hearing officer made recommendations and the Deputy Equal Employment Opportunity Officer held that the evidence did not support the allegations of discrimina-

tion. The Board of Appeals and Review of the United States Civil Service Commission affirmed this decision in September 1967. The administrative remedies were thus exhausted. The present suit followed.

Mr. Gnotta's argument is that he is entitled to due process; that although the Executive Order does not expressly provide a right of action, this does not prevent a federal court's fashioning an appropriate and effective remedy, citing *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); that the Executive Order has the force and effect of a statute; and that it creates the right and the *Jones* case creates the remedy.

One is inclined, initially and on the face of plaintiff Gnotta's testimony at the administrative hearing, to have a measure of sympathy for him for he is, in a sense, "bucking the establishment" or what seems to him to be an inflexible employment hierarchy. One easily senses his frustration with so long a work period without promotion, with a non-communicating former supervisor, with co-workers promoted over him, and with the daily discomfiture of a personality conflict. Contrastingly, one might note that the plaintiff chose to be sensitive about, rather than to assert rightful pride in, his Italian ancestry.

It may be conceded, as the plaintiff urges, that a public employee is entitled to a distinct measure of due process with respect to his employment. This court enunciated that principle as to procedural due process in *Jenkins* v. *Macy*, 357 F.2d 62, 68-70 (8 Cir. 1966), where a federal employee's discharge was at issue, and we there cited the fourteenth amendment cases of *Slochower* v. *Board of Higher Educ.*, 350 U.S. 551, 556 (1956), and *Wieman* v. *Updegraff*, 344 U.S. 183, 191-92 (1952), with their self-incrimination and loyalty oath contexts. And, as the plaintiff points out, appropriate compliance with procedural

requirements also was stressed in federal employee situations in *Connelly* v. *Nitze*, 401 F.2d 416 (D.C. Cir. 1968), and *McTiernan* v. *Gronouski*, 337 F.2d 31 (2 Cir. 1964).

As the plaintiff further observes, it has been said that Executive Orders such as Nos. 11246 and 10925 are to be accorded the force and effect of an act of Congress. *Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629, 632 (5 Cir. 1967), cert. denied, 389 U.S. 977; *Farmer* v. *Philadelphia Elec. Co.*, 329 F.2d 3, 8 (3 Cir. 1964). In each of these two cases, however, the court observed that the Executive Order did not contemplate its enforcement by private civil action, 375 F.2d at 632-33 and ns. 2 and 3; 329 F.2d at 8-10, and pointed the way to enforcement, instead, through the President's Committee on Equal Employment Opportunity or, possibly, in proper fact situations, under the Civil Rights Act of 1964. These are avenues which plaintiff Gnotta does not pursue.

Chapter 7 of Title 5 U.S.C. concerns judicial review of agency action. Section 702 provides that a person "suffering legal wrong because of agency action . . . is entitled to judicial review thereof." Section 706(1) provides that the reviewing court shall compel agency action unlawfully withheld. But § 701(a)(2) specifically states that the chapter does not apply where "agency action is committed to agency discretion by law."

Surely, promotion or nonpromotion of employees within a department is a matter of supervisory discretion and not ordinarily subject to judicial review. 5 U.S.C. § 554 (a)(2). See *McEachern* v. *United States*, 321 F.2d 31, 33 (4 Cir. 1963). It has been said that courts cannot undertake to pass on a plaintiff's qualifications for any given post or to compare them with those of an incumbent, *Powell* v. *Brannan*, 196 F.2d 871, 873 (D.C. Cir. 1952). A claim that the plaintiff's supervisor entertained a dis-

like for him has not sufficed for judicial review. *Fass* v. *Ruegg*, 379 F.2d 216, 218 (6 Cir. 1967). And Professor Davis asks, "Do we want courts inquiring into personnel management—salary increases, sick leave, office hours, allocation of parking spaces in the basement of the agency's building?" 4 K. Davis, Administrative Law Treatise § 28.16, at 82 (1958).

The integrity of these authorities and the soundness of the principles they espouse, would ordinarily incline a court to avoid interfering with administrative personnel decisions and to take a dim view of Gnotta's claims here. Indeed, his is not even a discharge case. He complains not of agency action but mainly of agency inaction.[2] And he demands a specified employment status.

But Gnotta also alleges something more. He attributes his unimproved status to discrimination because of national origin, and this, if true, is antagonistic to express government, and executive, policy.

This would normally take us to, or leave us in, the murky area of the scope of judicial review of agency action of this type. See, for example, *Charlton* v. *United States*, ..... F.2d ..... (3 Cir. 1969) (both opinions); 4 Davis, Administrative Law Treatise ch. 28 (1958) and, in particular, § 28.16 (Supp. 1965). We could proceed to attempt to resolve the question whether agency inaction of the type complained of here is reviewable by federal courts and, if the answer should be in the affirmative, to resolve the secondary question whether on this record, with its conflicting testimony, the agency decision is to remain undisturbed. Or we might assume a positive an-

2. We almost hesitate even to mention this, for it is reminiscent of the old negative order approach of somewhat sad and confusing memory See *Proctor & Gamble Co.* v. *United States*, 225 U.S. 282 (1912), and *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1939).

swer to the first question, without deciding it, and arrive at a positive answer to the second, on the theory that personality conflict and a non-communicating coworker do not of themselves equate with national origin discrimination, that the record at best is conflicting, and that there is substantial evidence to support the agency decision.

We agree with Judge Oliver, however, that Gnotta's selected procedure and his choice of defendants raise serious questions of governmental immunity and of consequent jurisdiction. We must, of course, face these issues first. *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 182, 189 (1936). When we do, Gnotta's appeal necessarily falls because of the identity of the defendants he had chosen to sue.

The defendants selected are the United States, the Civil Service Commission, the Army's Corps of Engineers, and seven individual employees of the Corps. But it is established that:

1. One cannot sue the United States without its consent and a court has no jurisdiction of a suit against the United States to which it has not consented. *United States* v. *Sherwood*, 312 U.S. 584, 586-88 (1941); *Mancilla* v. *United States*, 382 F.2d 269 (9 Cir. 1967), cert. denied, 390 U.S. 982.

2. "Congress has not constituted the [United States Civil Service] Commission a body corporate or authorized it to be sued *eo nominee*;" "a suit involving the action of the Commission generally must be brought against the individual Commissioners as members;" and the Administrative Procedure Act is not "to be deemed an implied waiver of all governmental immunity from suit." *Blackmar* v. *Guerre*, 342 U.S. 512, 514-16 (1952); *Bell* v. *Groak*, 371 F.2d 202, 204 (7 Cir. 1966).

3. The Department of the Army is a part of the executive branch of the United States Government. 10 U.S.C. §§ 131, 133 and 3010.

The plaintiff has not demonstrated that the United States has consented to be sued in the context of the relief requested by the first and second counts of the complaint, namely, positive relief directed to enhanced employment status. Clearly, then, the district court's action in dismissing the first and second counts as to the United States, the United States Civil Service Commission, and the Department of the Army was correct for the court had no jurisdiction of those counts as against those defendants.

The first two counts are also dismissable with respect to the seven named individual employee defendants. A suit against an officer of the United States is one against the United States itself "if the decree would operate against" the sovereign; *Hawaii* v. *Gordon,* 373 U.S. 57, 58 (1963); or if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration", *Land* v. *Dollar,* 330 U.S. 731, 738 (1947); or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act", *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 704 (1949). See *Dugan* v. *Rank,* 372 U.S. 609, 620 (1963). These principles, we feel, operate to identify the first and second counts against the named individuals with counts against the United States, for relief under the counts would compel those individuals to promote the plaintiff, with the natural effect a promotion has upon the Treasury, and to exercise administrative discretion in an official personnel area. This obviously is not a case which concerns either of the exceptions recognized in *Dugan* v. *Rank,* supra, 372 U.S. at 621-22, namely, where the officer's act is beyond his statutory power or where,

although the action is within the scope of his authority, the power, or the manner of its exercise, is constitutionally void. See *Simons* v. *Vinson*, 394 F.2d 732, 736 (5 Cir. 1968), cert. denied, 393 U.S. 968.

The first and second counts thus were properly dismissed as to all named defendants.

The third or damage count remains. For the reasons set forth above, it, too, is dismissable as to all defendants named other than the United States. The plaintiff, however, bases the count specifically on the Tucker Act, 28 U.S.C., § 1346(a)(2), which gives the United States district courts original jurisdiction, concurrent with the Court of Claims, of

> "Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort"

and thereby suggests the existence of consent to be sued. As to this, we adopt Judge Oliver's comments:

> "The plaintiff does not allege that his alleged cause of action was created or authorized by any particular provision or section of the Constitution, Act of Congress, [or] regulation of any executive department. Nor does he allege what sort of an express or implied contract he attempts to base his claim. None of the executive orders or regulations which the complaint cites purports to confer any right on an employee of the United States to institute a civil action for damages against the United States, in the event of their violation, even if it should be established that plaintiff's failure to have been promoted as an employee of the Corps of Engineers was in fact due to discrimination in violation of the Executive Orders

pleaded. Congress has complete power either to create or to refuse to create such a remedy. It did not authorize civil actions for damages under any of the laws (including the Executive orders and regulations) applicable to facts pleaded by plaintiff in this case.

. . . .

"The [1964] amendment [of 28 U.S.C. § 1346] merely extended to the district court jurisdiction over cases which formerly could be tried only in the Court of Claims. . . . That statute does not authorize and it is not broad enough to confer jurisdiction to hear and determine a claim for damages arising out of alleged discriminatory practices which may have resulted in an employee of the Corps of Engineers being 'passed over' for promotion. See *Love* v. *United States*, (8th Cir. 1943) 108 F.2d 43 [cert. denied 309 U.S. 673]. . . ."

We emphasize that Executive Order No. 11246 enunciates government policy by way of prohibiting discrimination because of national origin; imposes that policy on the "head of each executive department and agency"; and directs the Civil Service Commission to "supervise and provide leadership and guidance", to provide for the impartial consideration of all complaints of discrimination, for at least one impartial review within the department, and for appeal to the Commission. All this has been provided to plaintiff Gnotta (except that he now challenges on appeal the impartiality of the trial examiner). But none of the Executive Order's language speaks in terms of money damages or of a money claim against the United States.

The third count, too, was properly dismissed.

On the last page of his appellate brief the plaintiff seems to suggest the applicability of 28 U.S.C. § 1343(4) which grants the district court jurisdiction "of any civil action authorized by law" to recover damages or to secure

equitable relief under any act of Congress for the protection of civil rights. No reference to this statute is in the complaint and it does not appear to have been called to the attention of the district court. In any event, the Executive Order did not provide a civil action "authorized by law", within the meaning of § 1343(4). *Congress of Racial Equality* v. *Commissioner, Social Security Administration,* 270 F.Supp. 537, 542 (D. Md. 1967). See *Farmer* v. *Philadelphia Elec. Co.,* supra, 329 F.2d at 8-10.

We suspect that the plaintiff has no real disagreement with most of what has been said above. His real emphasis here seems to be on *Jones* v. *Alfred H. Mayer Co.,* supra, 392 U.S. 409 (1968).

This court, of course, is most familiar with the *Jones* case. We fail to see its application here, and we get little assistance from the plaintiff's argument as to its general applicability. The Joneses did invoke federal jurisdiction under § 1343(4) but their action, if 42 U.S.C. § 1982 was applicable, was then clearly "authorized by law". *Jones* v. *Alfred H. Mayer Co.,* supra, 392 U.S. at 412 n.1. The Supreme Court held that § 1982 was applicable. In the present case, there is nothing comparable to § 1982 unless the Executive Order in question could so qualify. We have held above that it does not.

Plaintiff Gnotta has too many hurdles to overcome in this lawsuit as presently formulated.

Affirmed.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 928

LOUIS J. GNOTTA, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner has been employed as a Cartographic Aide, Grade GS–7, by the Department of the Army, Corps of Engineers, Kansas City District, since 1955 and has never been promoted (Pet. A4). He claims that his non-promotion resulted from discrimination against him because of his Italian ancestry, in violation of Executive Order No. 11246, which declares that it is the policy of the United States to prohibit discrimination in federal employment because of race, creed, color, or national origin (Pet. A1). After a hearing on his complaint, the Army's Equal Employment Opportunity Officer held that the evidence did not substantiate the allegation of discrimination, and



373-201—70

the Board of Appeals and Review of the Civil Service Commission affirmed this decision (Pet. A5–A6).

Petitioner then commenced an action in the district court against the United States, the Civil Service Commission, the Department of the Army and individual employees of the Corps of Engineers (Pet. A2). He sought (1) review of the Civil Service Commission's decision; (2) a writ of mandamus to compel compliance with Executive Order No. 11246; and (3) damages of $10,000 (Pet. A2). The district court dismissed the complaint for "want of proper jurisdictional allegations" (Pet. 6). The court of appeals affirmed, on the ground that the named defendants were immune from suit (Pet. A9–A12).

1. With respect to the non-damage claims, the court of appeals correctly held that petitioner named the wrong parties defendant. *Blackmar* v. *Guerre*, 342 U.S. 512, squarely held that an action for judicial review of action on government personnel is not properly brought against either the Civil Service Commission or the employee's supervisors. Nor, as the court of appeals pointed out, is the Department of the Army a suable entity. Finally, mandatory relief may not be obtained against the United States in cases of this type, since there is no statute authorizing it.[1] The proper parties defendant in this case, for

[1] These conclusions are not affected by 28 U.S.C. 1343(4), which grants the district courts jurisdiction "of any civil action authorized by law" to recover damages or to secure equitable relief "under any Act of Congress providing for the protection of civil rights, including the right to vote." The statute does not deal with the problem of proper parties defendant. Moreover, Executive Order No. 11246, the alleged violation of which is the gravamen of petitioner's case, is not an "Act of Congress."

purposes of mandatory relief, were the individual Civil Service Commissioners, who could have been sued in their official capacity in the district court under 28 U.S.C. 1391(e). Nothing in the decision of the court of appeals would prevent petitioner now from suing the Commissioners in the district court under 28 U.S.C. 1391(e).[2]

2. In any event, on the merits petitioner is not entitled to relief. As the court of appeals noted (Pet. App. A4–A5), several witnesses testified that there was no discrimination against Gnotta or against Italians generally in the Corps of Engineers.[3] Assuming that a failure to promote is reviewable, this evidence was sufficient support for the finding of no discrimination. And in view of the support in the record for this finding, it is not necessary to reach the question of whether an action for damages lies against the United States for discriminatory failure to promote.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

FEBRUARY 1970.

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[2] 28 U.S.C. 1391(e) permits suit against federal officers in their official capacity, in the district where the cause of action arose. Petitioner was employed in the Western District of Missouri, where this suit was brought. *Blackmar* v. *Guerre* was decided before the passage of 28 U.S.C. 1391(e), at a time when suit against the individual Civil Service Commissioners could only be brought in the District of Columbia.

[3] The testimony of the witnesses referred to by the court of appeals is set forth in summary narrative form at pp. 25–35 of the appendix filed by appellant in the court of appeals.

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